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In re: Thom Tillis Committee,)
Collin McMichael,)
Treasurer in his official)
capacity)

MUR 6870

RESPONSE AND MOTION TO DISMISS COMPLAINT

Thom Tillis Committee, the principal authorized committee of Thom Tillis, Republican nominee for the US Senate from North Carolina, by and through its Treasurer, Collin McMichael, in his official capacity (collectively hereafter, "the Committee") files this Response and Motion to Dismiss the Complaint filed with the Federal Election Commission ("Commission") by the American Democracy Legal Fund against American Crossroads, and of which the Committee was notified in September 2014.

Complainant alleges that American Crossroads committed a violation of the Federal Election Campaign Act of 1971, as amended ("the Act") by utilizing bare snippets of publicly available video footage and photographs of Speaker Tillis in the American Crossroads independent public communications regarding the North Carolina Senate race. By extension, the Commission has notified the Committee of a possible violation of the Act by the Committee. The Committee affirmatively states that no violation of the Act has occurred.

FACTUAL RESPONSE

The inquiry required of the Committee is whether any agent of the Committee engaged in any conduct from and after the publication of Committee advertising and public dissemination of its campaign materials that would satisfy the 'conduct' prong of the Commission's regulations governing 'Independent and Coordinated Public Communications'. 11 CFR §109.21(d). The Committee has conducted reasonable due diligence among the candidate, the campaign staff and vendor(s) who would meet the definition of 'agent' of the campaign (*see* 11 C.F.R. §109.3(b)) and has concluded that no Committee agent has engaged in conduct described in 11 C.F.R. §109.21(d) for purposes of establishing a coordinated public communication.

See the *Affidavit of Mr. Jordan Shaw, Campaign Manager, Thom Tillis Committee*.

Absent the presence of conduct by the Committee, the candidate or an agent of either, as described in the Commission's regulations for a coordinated public communication, no violation of the Act can be ascribed to the Committee. See 11 C.F.R. §109.21(d).

Further, the communication which the Complainant alleges to constitute a violation of the Act is a thirty-second television advertisement¹ which appears to contain fewer than five seconds of footage and photographs from different videos publicly available on the Committee's campaign website, published on YouTube² and which have been viewed by thousands of visitors to the YouTube site alone.

Even the Complaint acknowledges that the source of the photograph(s) and video footage was the internet and publicly available materials and information:

" 4. Respondent's ad is overwhelmingly comprised of video footage that was taken from campaign videos created and owned by the Thom Tillis Committee.⁶

a) The video footage in Respondent's ad showing Tillis talking in a suit in an office setting is the same footage that first appeared in Tillis's own ad called "Let's Clean Up Her Mess," posted to Tillis's YouTube account in January 2014.⁶ This video footage also appears in another Tillis campaign video posted to its YouTube account in February 2014 called "Tillis Montage 2."⁷

b) The video footage of Tillis talking to three women and a man is the very same footage that first appeared in Tillis's own ad called "Paper Route" that was posted to Tillis's YouTube account in March 2014.⁸

c) The footage of Tillis walking and talking on the street that is used throughout Respondent's is the same footage that first appeared in the "Tillis Montage 2" video.

See also the Footnotes to Complaint:

Respondent's TV ad can be viewed at
<https://www.youtube.com/watch?v=PEkXpx53Ivc>.

⁶ Tillis's "Let's Clean Up Her Mess" ad can be viewed at
<https://www.youtube.com/watch?v=RZgestENciw>. The ad includes a disclaimer stating it was "Paid for by the Tom Tillis Committee. Approved by Thom Tillis." The "Tillis Montage 2" video can be viewed at
<https://www.youtube.com/watch?v=cuiqFHAN7A>).

⁸ The "Paper Route" ad can be viewed at
https://www.youtube.com/watch?v=Cuk6V4KV_s. This ad includes a

¹ See American Crossroads "Guts" NC YouTube:
<https://www.youtube.com/watch?v=PEkXpx53Ivc>

² https://www.youtube.com/watch?v=Cu0q6V4KV_s "Paper Route";
<https://www.youtube.com/watch?v=RZgestENciw> "Let's Clean Up Her Mess";
https://www.youtube.com/watch?v=A2_nMCJ2uDA "Montage 2"

disclaimer stating it was "Paid for by the Tom Tillis Committee.
Approved by Thom Tillis."

See Complaint, page 2.

In fact, the Complaint contains not a single fact alleging any conduct that would meet the conduct prong for a coordinated public communication.

The facts clearly demonstrate that there was no conduct by the Committee or its agent(s) that meet the requisite 'conduct prong' of the Commission's regulations governing coordinated public communications.

LEGAL ARGUMENTS AND AUTHORITIES

The Commission has received prior complaints similar in nature to this one, to-wit: a third party group utilized some small portion of a candidate's publicly available materials in developing the group's communications *about* the candidate. A political opponent complained alleging that the use of *any* portion of a candidate's materials constitutes a violation of the prohibition against coordinated public communications. However, the Commission has rejected that argument for a number of reasons.

A coordinated expenditure about a candidate or political party is defined under the statutes and Commission regulations. *See* 2 U.S.C. § 441a(a)(7)(B)(i) (2006); 11 C.F.R. § 109.20(b) The regulations also contain a detailed definition of a "coordinated public communication." To meet the definition, communications must meet satisfy at least one of the enumerated "content" standards, and at least one of the enumerated "conduct" standards. *See id.* § 109.21(a)(2)-(3).

In the Complaint in this matter, the primary question is whether there are *any* facts present that would meet the conduct standards of §109.21(d). The Complaint asserts not a single fact in that regard – because there *are* no facts to support a finding of the conduct required under that prong of the Commission's regulations.

In the Explanation and Justification for the conduct standard as related to republication of candidate materials, the Commission's determination in its Final Rules on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 429 (January 3, 2003) is applicable here, to-wit:

"11 CFR 109.21(d)(6) explains that the focus is on the conduct of the candidate that occurs after the initial preparation the campaign materials. For example, if a candidate requests or suggests that a supporter pay for the republication of a campaign ad, the resulting communication paid for by the supporter satisfies both a content standard (republication) and conduct standard (request or suggestion), and is therefore a coordinated communication. However, without that request or suggestion, and assuming no other contacts with the candidate, the candidate's authorized committee, or their agents, the communication does not satisfy the "request or suggestion" conduct standard and is not a coordinated communication even.

though it contains campaign material prepared by the candidate.” 68 Fed. Reg. 429 (January 3, 2003)

The Complaint asserts that because the American Crossroads advertisement used a tiny portion of publicly available photographs and video footage from YouTube, there is strict liability and a *per se* violation of the law. Such a position is inconsistent with the Commission’s precedent in similar cases.

Because the photograph(s) and footage are publicly available and, as the Complaint states, were apparently obtained by American Crossroads from YouTube postings, there can be no coordinated public communication.

The Commission has made clear that material obtained from a publicly available source cannot form the foundation of a claim of coordination, *See* Commission, Final Rules on Coordinated Communications, 71 Fed. Reg. 33,190, 33,209 (June 8, 2006). The Commission adopted that approach in dismissing the complaint filed against Emily’s List for its use of candidate photograph(s) in Emily’s List materials. *See* MUR 5743. According to the Statement of Reasons issued by Commissioners Hans von Spakovsky and Ellen L. Weintraub in that case, the public availability of the candidate materials at issue and the fact that those candidate materials constituted only a small portion of the Emily’s List communication were also important factors (“... We are reluctant to apply the republication regulation to a case involving the use of downloaded photographs, from an unrestricted website, that were only a small part of larger mailers created by EMILY’s List”)³.

In short, the Complaint presents no evidence at all of any coordination between the Committee and American Crossroads.

CONCLUSION

There are no facts alleged in the Complaint that constitute the conduct prong for a coordinated public communication and the Commission has dismissed similar cases where a third party used some portion of publicly available candidate materials in a public communication paid for by the third party. The Commission’s regulations, explanation of its regulations and precedent in other cases require the dismissal of the Complaint.

Accordingly, the Committee moves for dismissal.

³ <http://www.fec.gov/members/weintraub/murs/mur5743.pdf> Statement of Reasons of Commissioners Hans von Spakovsky and Ellen L. Weintraub

Respectfully submitted,

A handwritten signature in black ink that reads "Cleta Mitchell". The signature is written in a cursive, slightly stylized font.

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